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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ELLIS, Defendant and Appellant.	B271284 (Los Angeles County Super. Ct. No. KA110467)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Reversed and remanded.

Lisa Holder, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

This case turns on whether Deputy Gilbert Lozano detained Matthew Ellis or knew he was on parole before Ellis dropped a knife that ultimately led to his conviction for carrying a concealed dirk or dagger. The trial court concluded Deputy Lozano and Ellis engaged in a consensual encounter before Ellis dropped the knife "simultaneously" with his admission he was on parole. We conclude that Deputy Lozano detained Ellis without reasonable suspicion, and did not have advance knowledge Ellis was on parole, before Ellis dropped the knife. Therefore, because law enforcement obtained the knife as a result of an illegal detention, we reverse the judgment and remand to the trial court with directions to grant Ellis's motion to suppress evidence of the knife.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ellis Drops a Knife During an Encounter with Police*

On the afternoon of August 19, 2015 Ellis and another man sat on a curb outside the entrance to a bar in Pomona. Deputy Lozano drove by while conducting "patrol checks" in the area "for local transients that hang out and loiter." Deputy Lozano targeted the area for its "high narcotics activity." He stated that "a lot of local transients go [to the bar] when they buy their meth." Deputy Lozano knew Ellis as a transient in the area who frequented the area near the bar.

Deputy Lozano observed Ellis for less than five minutes while traveling in his patrol car. During that time Ellis did not stand or "stumbl[e] around." After passing Ellis, Deputy Lozano

made a U-turn. The deputy parked his patrol car "right next" to Ellis, within a foot or two, and may have turned on his lights and siren. Deputy Lozano asked Ellis and the other man if they were doing any business at the bar or a liquor store next door to the bar, and the men told him they were not. Deputy Lozano then directed the men's attention to a "no loitering" sign less than two feet from them. The deputy "went ahead and told [Ellis] it's a violation of loitering and that we've gotten numerous complaints from the [bar] of transients just loitering in front of the business."

What happened next is not clear from the record. Deputy Lozano originally testified that Ellis told him he had nowhere else to go and was on parole. But Deputy Lozano also testified that he first asked Ellis to approach the front hood of the patrol car, after which Ellis told him he was on parole. In yet another description of their encounter, Deputy Lozano said Ellis did not volunteer that he was on parole until after Deputy Lozano had asked Ellis to put his hands on the hood of the patrol car and Ellis had complied. At some point Deputy Lozano heard something drop to the ground. Deputy Lozano handcuffed Ellis, conducted a pat search, and put Ellis in the backseat of his patrol car. Deputy Lozano walked over to where Ellis had been standing and found a knife inside a black sheath. Back in the patrol car, Deputy Lozano confirmed that Ellis was on parole.

B. *The Trial Court Denies Ellis's Motion To Suppress*

The People charged Ellis with one count of carrying a concealed dirk or dagger in violation of Penal Code section 21310[1] and alleged he suffered two prior serious or violent convictions.

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1 Undesignated statutory references are to the Penal Code.

Ellis pleaded not guilty and filed a motion to suppress evidence of the knife found by Deputy Lozano.

At a hearing on the motion to suppress, Deputy Lozano testified that on the day he detained Ellis he was not responding to a call from anyone at the bar. He said he knew of Ellis from one or more previous encounters five to six months earlier when he saw Ellis collecting recyclables from a dumpster in an alley near the bar. At that time, Deputy Lozano said he had reason to believe Ellis may have been on probation or parole, but he "wasn't too sure." Counsel for Ellis asked Deputy Lozano to clarify his testimony:

Q: "So on that day -- you knew in the past he had been on probation or parole; but on this day, you didn't know if he was on probation or parole, currently?"

A: "Correct, ma'am."

Q: "So you were actually not detaining him for that but detaining him because there was a 'no loitering' sign?"

A: "Yes, ma'am."

Q: "Correct?"

A: "Yes, ma'am."

Q: "So that's why you initially parked, ordered him [to the car], because he was sitting under the 'no loitering' sign, correct?"

A: "Yes, ma'am."

Q: "And it was after you had detained him that you found out -- or confirmed that he was on parole, correct?"

A: "Yes, ma'am."

Counsel for Ellis asked Deputy Lozano several additional questions about whether the deputy's request that Ellis move toward the patrol car was a command. For example, she twice

asked Deputy Lozano whether he "ordered" Ellis to "come to you" or "come here." Deputy Lozano responded affirmatively. Deputy Lozano also testified that he detained Ellis for loitering in violation of Los Angeles County Code section 13.56.010, one of two code provisions identified on the "no loitering" sign that hung near where Ellis had been sitting.

At the conclusion of Deputy Lozano's testimony, counsel for Ellis argued that "the initial detention happened at the time that the officer pulled up to the curb [and] ordered [Ellis] to come to him." She argued Deputy Lozano lacked reasonable suspicion to detain Ellis at that time because the deputy merely observed Ellis sitting on a curb. Deputy Lozano did not see Ellis attempt to buy or sell drugs, nor did he observe any drug activity in the area at the time. Counsel for Lozano further argued that the loitering provision Deputy Lozano identified in his police report did not justify Ellis's detention because that provision applied only to minors, and Deputy Lozano testified he knew Ellis was not a minor. The other code section identified on the "no loitering" sign, section 647, subdivision (e), applied only to a person "who lodges in a building, structure, vehicle or place . . . without the permission of the owner or person entitled to possession or in control of it," and Ellis was neither "lodging" in the bar or the nearby liquor store, nor did Deputy Lozano testify that anyone from the bar or store had called to complain about Ellis. Finally, counsel for Ellis argued that, because Deputy Lozano did not know Ellis was on parole until after he had detained Ellis, Ellis's parole status did not validate the suspicionless search.

The trial court denied Ellis's motion to suppress. The court identified the "critical issue" as "whether the officer's request that [Ellis] approach constitutes a detention." The court reasoned it was not because "there was no show of force" and "the officer indicated he asked [Ellis] to approach," as opposed to commanding him to do so. The court found that, "simultaneously" with asking Ellis to approach, "there was a sound, his statement verifying his parole status; and the officer was entitled at that point for his own security to pat down and detain the defendant to find out what was happening there." With regard to the loitering statute and its application to minors only, the trial court ruled that Deputy Lozano's mistake was negated by his good faith belief the statute applied.

During the subsequent trial, Deputy Lozano testified he had done more than simply "ask" Ellis to approach him. He said he had in fact told or ordered Ellis to put his hands on the hood of the patrol car. Counsel for Ellis renewed the motion to suppress, and the trial court denied it again.

C. *Ellis Is Convicted and Sentenced*

A jury convicted Ellis of violating section 21310, as charged. In a separate hearing, the court found true the allegation that Ellis suffered two prior serious or violent convictions under the three strikes law (§§ 667, subds. (b)-(j); 1170.12). The court sentenced Ellis to the middle term of two years, doubled under the three strikes law, for a total prison term of four years. Ellis timely appealed.

DISCUSSION

A. *Standard of Review and Applicable Law*

"'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated.'" (*People v. Brendlin* (2008) 45 Cal.4th 262, 268; see *People v. Linn* (2015) 241 Cal.App.4th 46, 56.) "'As the finder of fact in a proceeding to suppress evidence [citation], the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. [Citation.] The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution.'" (*Linn*, at p. 56, quoting *People v. Woods* (1999) 21 Cal.4th 668, 673.)

"'We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.'" (*Brendlin*, *supra*, 45 Cal.4th at p. 268; see *Linn*, *supra*, 241 Cal.App.4th at p. 56 [reviewing court has the ultimate responsibility "to measure the facts, as found by the trier, against the constitutional standard of reasonableness"].) "'[W]hile we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of a search on the facts so found.'" (*Linn*, at pp. 56-57.)

"A seizure of the person occurs '"whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away."'" (*People v. Douglas* (2015) 240 Cal.App.4th 855, 860, quoting *People v. Celis* (2004) 33 Cal.4th 667, 673; see *People v. Brown* (2015) 61 Cal.4th 968, 976-977.) "There are two different bases for detaining an individual short of having probable cause to arrest: (1) reasonable suspicion to believe the individual is involved in criminal activity [citation]; and (2) advance knowledge that the individual is on searchable probation or parole." (*Douglas*, at p. 860; see *People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

Ellis contends neither basis existed prior to his detention, and, because the deputy discovered the knife as a result of that detention, the trial court should have suppressed it. In a challenge to the lawfulness of a warrantless search or seizure, the People have the burden to prove by a preponderance of the evidence that the search or seizure fell within one of the recognized exceptions to the warrant requirement. (*Douglas*, *supra*, 240 Cal.App.4th at p. 860; see *Schmitz*, *supra*, 55 Cal.4th at p. 915, fn. 4 ["[i]t is the People's burden to justify a warrantless search"]; *People v. Rios* (2011) 193 Cal.App.4th 584, 590 [where officers "lack[] a warrant, the People [have] the burden of establishing, by a preponderance of the evidence, an exception to the warrant requirement"].)

B. *Deputy Lozano Detained Ellis by Accusing Him of Violating Loitering Laws and Asking Him To Approach the Patrol Car*

"'Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive:

consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] . . . Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime.' [Citation.] 'An officer may approach a person in a public place and ask if the person is willing to answer questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution.' [Citations.] A detention, on the other hand, is a seizure, albeit a limited one, for which reasonable suspicion is required." (*Linn*, *supra*, 241 Cal.App.4th at p. 57.)

"A detention occurs when an officer intentionally applies physical restraint or initiates a show of authority to which an objectively reasonable person innocent of wrongdoing would feel compelled to submit, and to which such a person in fact submits." (*Linn*, *supra*, 241 Cal.App.4th at p. 57; see *Florida v. Bostick* (1991) 501 U.S. 429, 434, 437-438.) "'In situations involving a show of authority, a person is seized "if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,'" or "'otherwise terminate the encounter'" [citation] and if the person actually submits to the show of authority.'" (*Linn*, at pp. 57-58; see *Brendlin v. California* (2007) 551 U.S. 249, 255; *Brown, supra,* 61 Cal.4th at p. 974.) "The test for the existence of a show of authority is an objective one and thus, '[n]either the officer's uncommunicated state of mind nor the subjective belief of the individual citizen is relevant to the determination of whether a

police contact is a detention.'" (*Linn*, at p. 58; see *People v. Zamudio* (2008) 43 Cal.4th 327, 341 ["[t]he test is 'objective,' not subjective; it looks to 'the intent of the police as objectively manifested' to the person confronted"].)

Circumstances indicating a detention, even where a person does not attempt to leave an encounter with law enforcement, include the threatening presence of several officers, the display of a weapon by an officer, the physical distance between an officer and the person, and the use of language or a tone of voice indicating that compliance with the officer's request is required. (See *U.S. v. Washington* (9th Cir. 2007) 490 F.3d 765, 771-772; *Linn*, *supra*, 241 Cal.App.4th at pp. 58, 65.) Other relevant factors include the time and place of the encounter, whether the police indicated the defendant was suspected of a crime, whether the police retained the defendant's documents, whether the police exhibited other threatening behavior, and whether the police informed the person of his or her right to terminate the encounter. (*Washington* at pp. 771-772; see *Linn* at p. 58.) In particular, "[q]uestions by an officer of a sufficiently accusatory nature may 'be cause to view an encounter as a nonconsensual detention.'" (*Linn*, at p. 58; see *In re J.G.* (2014) 228 Cal.App.4th 402, 412 ["'the degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention'"]; accord, *People v. Lopez* (1989) 212 Cal.App.3d 289, 292.) "The same is true for commands or directions issued in the course of an encounter." (*Linn*, at p. 58; see *In re J.G.*, at p. 412 ["if 'the content or form of the question impart[s] any compulsion to comply,' there may be a 'basis for finding [the suspect] was under the kind of restraint associated with a Fourth Amendment detention'"]; *People v. Verin* (1990)

220 Cal.App.3d 551, 556 ["[w]hile there is nothing preventing a police officer from addressing questions to people on the street [citation], when an officer 'commands' a citizen to stop, this constitutes a detention because the citizen is no longer free to leave"].)

The People argue Ellis's encounter with Deputy Lozano was consensual until some time after Ellis volunteered he was on parole. We agree with the People that the police may question a person even when the police have no basis for suspecting the person committed a crime. Here, for example, Deputy Lozano's question whether Ellis had any business at the bar or nearby liquor store was part of a consensual encounter, particularly if Deputy Lozano had not turned on the patrol car's lights and siren (which is unclear from the evidence). (See *Bostick*, *supra*, 501 U.S. at pp. 434-435 ["even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual"]; *People v. Rivera* (2007) 41 Cal.4th 304, 309 ["[i]t is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so"].) As the People acknowledge, the Fourth Amendment requires only that police "do not induce cooperation by coercive means." (*United States v. Drayton* (2002) 536 U.S. 194, 201.)

The consensual encounter, however, ripened into detention when Deputy Lozano implicated Ellis in illegal activity and asked/told/ordered Ellis to put his hands on the patrol car. The circumstances here are similar to those in *People v. Linn*, *supra*, 241 Cal.App.4th 46, where the court held that a detention occurred when a police officer implicated the driver of a car in her passenger's illegal activity (throwing a cigarette butt out of the

window of the car)[2] and then "commanded" her to put out her cigarette and put down her can of soda. (*Id.* at pp. 64-65; see *People v. Foranyic* (1998) 64 Cal.App.4th 186, 188 ["[w]hile the officer was certainly free to approach [the defendant] and speak to him, once he ordered him to lay down his bike and step away from it, he clearly conveyed the impression [the defendant] was not free to leave," and once the defendant "submitted to this show of authority, the detention was complete"]; cf. *People v. Leath* (2013) 217 Cal.App.4th 344, 353 [the police officers "did not accuse defendant of any illegal activity when they first addressed him"]; *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1287 ["neither the questioning nor the warrant check related to specific and identifiable criminal activity"]; *Lopez*, *supra*, 212 Cal.App.3d at p. 293 [the officers' questions "were brief, flip, and, most importantly, did not concern criminal activity"].) When Deputy Lozano accused Ellis of violating a particular law and asked or instructed him to put his hands on the hood of the patrol car, a reasonable person would not have felt free to terminate the encounter. At that point, Ellis was detained.

The fact that Deputy Lozano's request may not have been a formal command does not mandate a different conclusion. Even accepting the trial court's finding that Deputy Lozano merely "asked" Ellis to approach the patrol car, a reasonable person under the circumstances would have felt compelled to do so. Indeed, Deputy Lozano already had implicated Ellis in criminal loitering, and he asked not only that Ellis approach him but also

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[2] The police officer testified that he told the defendant "'[t]he reason for my contact was because . . . the passenger . . . was flicking ashes out of the window." (*Linn*, *supra*, 241 Cal.App.4th at p. 51.)

that Ellis put his hands on the hood of the patrol car. "Asking" Ellis to oblige did not negate the coercive nature of the request. (See *Linn*, *supra*, 241 Cal.App.4th at p. 64, fn. 7 ["[e]ven if the trial court had found that [the officer] merely 'asked' [the defendant] to put out her cigarette and put down her soda can, it has been found under similar circumstances that an officer doing so does not negate the coercive nature of the request"]; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1112 ["'[i]t is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not'"]; *U.S. v. Beauchamp* (6th Cir. 2011) 659 F.3d 560, 569 [an officer's encounter with a person "does not lose its coercive character simply because he was referred to on the record as having 'asked' for [the person's] compliance as opposed to 'ordering' it," and "[s]uch a distinction is purely semantic"].)

In addition to accusing Ellis of violating the law and asking him to put his hands on the hood of the patrol car, Deputy Lozano parked his patrol car very close to Ellis—only one or two feet away. The positioning of the patrol car, combined with Deputy Lozano's question about whether Ellis had any business in the area, would have "placed an objectively reasonable person on alert that [Deputy Lozano] might be investigating [Ellis] specifically for a possible violation of the law and, therefore, created doubt as to whether [he] was free to leave." (*Linn*, *supra*, 241 Cal.App.4th at p. 65.) Finally, there is no evidence Deputy Lozano informed Ellis he was free to end their conversation. Thus, although it is undisputed Deputy Lozano did not use or threaten to use physical force to detain Ellis, under the totality of the circumstances a reasonable person in Ellis's shoes would not

have felt free to terminate the encounter with Deputy Lozano after the deputy accused Ellis of violating loitering laws and asked him to put his hands on the patrol car. (See *Washington*, *supra*, 490 F.3d at pp. 771-772.)

C. *Deputy Lozano Had No Reasonable Suspicion To Detain Ellis*

"'A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (*People v. Casares* (2016) 62 Cal.4th 808, 837-838; see *People v. Souza* (1994) 9 Cal.4th 224, 231.) "Such reasonable suspicion cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area." (*Casares*, at p. 838; see *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [an individual's presence in an area of expected criminal activity does not support reasonable suspicion of criminal activity]; *People v. Pitts* (2004) 117 Cal.App.4th 881, 887 [being in a "high crime area" is not a factor related to an individual].) "Even recent, specific crimes, without additional factors specific to the defendant, are not sufficient." (*People v. Perrusquia* (2007) 150 Cal.App.4th 228, 233.) "Without reasonable suspicion, a person 'may not be detained even momentarily.'" (*Washington*, *supra*, 490 F.3d at p. 774, quoting *Florida v. Royer* (1983) 460 U.S. 491, 498.)

The People argue Deputy Lozano had reasonable suspicion to detain Ellis because Ellis was in violation of various loitering statutes and because the deputy had a vague sense that Ellis

"could be engaged in illegal behavior." Neither argument has merit.

1. The Loitering Statutes

Deputy Lozano testified he detained Ellis because he had reasonable suspicion Ellis was loitering in violation of Los Angeles County Code section 13.56.010 (section 13.56.010). Section 13.56.010 states in relevant part: "It is unlawful for any minor under the age of 18 years to be present in a 'public place,' . . . between the hours of 10:00 p.m. on any given day and sunrise of the immediately following day." Deputy Lozano admitted he knew Ellis was not under the age of 18 (Ellis was almost 40 at the time of the offense) and he encountered Ellis at 4:52 p.m., well before 10:00 p.m. Thus, section 13.26.010 did not apply to Ellis.

The People argue Ellis's conduct nevertheless fell within the scope of section 647, subdivision (e), which also was posted on the "no loitering" sign above Ellis, or perhaps section 647, subdivision (h). Section 647, subdivision (e), provides that a person who "lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it" is guilty of a misdemeanor. Section 647, subdivision (h), makes it a misdemeanor for a person to "loiter[], prowl[], or wander[] upon the private property of another, at any time, without visible or lawful business with the owner or occupant." As used in the latter subdivision, "loiter" means "to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered."

Neither of these provisions could have provided Deputy Lozano with reasonable suspicion that Ellis was involved in criminal activity. Ellis was not "lodging" on the curb in front of the bar, nor did the prosecutor attempt to show he was. "Lodging" connotes something more than briefly sitting. Cases under section 647, subdivision (e), or its predecessor, involve defendants who were camping or sleeping on private or public property without permission. (See, e.g., *People v. Lyons* (1971) 18 Cal.App.3d 760, 773 [defendant found sleeping on a cot in someone else's apartment]; *Stone v. Agnos* (9th Cir. 1992) 960 F.2d 893, 895 [defendant arrested for sleeping in a public plaza]; *Joyce v. City and County of San Francisco* (N.D.Cal. 1994) 846 F.Supp. 843, 862-863 [predecessor of section 647, subdivision (e), was not unconstitutionally vague as applied to camping on public or private property without permission].) In *Joyce v. City and County of San Francisco*, *supra*, 846 F.Supp. 843 the court noted that San Francisco police officers had even been advised not to enforce the prohibition in section 647, subdivision (e), against "the mere lying or sleeping on or in a bedroll," but to apply it only to persons who had constructed temporary shelters. (*Id.* at p. 863.) Deputy Lozano could not have had reasonable suspicion that Ellis was unlawfully "lodging" on a curb after merely observing him sit there for less than five minutes.

Section 647, subdivision (h), also could not provide a basis for reasonable suspicion that Ellis was involved in criminal activity. That provision applies only where a person is loitering "for the purpose of committing a crime." For Deputy Lozano to detain Ellis under this provision, he had to have had a reasonable suspicion Ellis intended to commit a crime. (See *In re Joshua M.* (2001) 91 Cal.App.4th 743, 747 [a person violates section 647,

subdivision (h), "if he or she is found loitering on the private property of another with the specific intent to commit a crime"]; see also *In re Gary H.* (2016) 244 Cal.App.4th 1463, 1476 [violation of section 653b, which prohibits loitering near a school, "requires an arresting officer to have evidence establishing probable cause to believe a suspect intends to commit a crime"].) For a violation of section 647, subdivision (h), the defendant also must have "delayed, lingered, prowled, or wandered on the private property of someone else." This element is not met where a person merely stands on another's private property; it requires a more persistent, unwanted presence. (See *People v. Frazier* (1970) 11 Cal.App.3d 174, 183-184 [school repeatedly warned the defendant, who was not a student, to leave]; *Edgerly v. City and County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 954-955 [officers had no probable cause to arrest a non-resident of a housing cooperative for violating section 647, subdivision (h), where officers knew only that the defendant was not a resident and they had observed the defendant on the property for five minutes].)

Deputy Lozano did not articulate any suspicion that Ellis intended to commit a crime, and there is no evidence that Ellis "delayed, lingered, prowled, or wandered" in front of the bar or was ever asked to leave and declined or returned. (See, e.g., *In re Gary H.*, *supra*, 244 Cal.App.4th at p. 1478 [loitering with intent to engage in a fight evidenced by the defendant's use of "angry and animated words and gestures"]; *Frazier*, *supra*, 11 Cal.App.3d at pp. 183-184 [evidence sufficient to show the defendant loitered for the purpose of committing a crime where the defendant had frequented a school without apparent business there, repeatedly refused to leave after warnings, on one occasion

was under the influence of alcohol and present while others were gambling, and was parked illegally].)

The People argue that, even if Deputy Lozano mistakenly believed Ellis was subject to section 13.56.010 or some other loitering law, the evidence obtained as a result of Ellis's detention was admissible under the so-called "good faith rule." That rule and the Fourth Amendment, however, tolerate "only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." (*Heien v. North Carolina* (2014) ___ U.S. ___, ___ [135 S.Ct. 530, 539]; see *People v. Campuzano* (2015) 237 Cal.App.4th Supp. 14, 16 ["an objectively reasonable mistake of law can give rise to a reasonable suspicion under the Fourth Amendment"]; *United States v. Longoria* (N.D.Fla. 2016) 183 F.Supp.3d 1164, 1182 ["an *unreasonable* mistake of law cannot help form the basis of reasonable suspicion"].) An objectively reasonable mistake of law may occur where courts have not provided guidance on the scope or meaning of a particular law (see *Heien*, at p. 537 ["'a doubt as to the true construction of the *law* is as reasonable a cause of seizure as a doubt respecting the fact'"]) or where a statute is declared unconstitutional after a defendant's arrest, thus invalidating a search or arrest predicated on that statute (see *id.*, at p. 538).

The statutes at issue here are neither vague nor unconstitutional. An objectively reasonable officer could not construe section 13.26.010 to apply to a 40-year-old man during broad daylight, construe section 647, subdivision (e), to apply to someone sitting on a curb as opposed to sleeping there, or construe section 647, subdivision (h), to apply to a person who merely sat on a curb in a high crime area. (See *Heien*, *supra*, ___ U.S. at p. ___ [135 S.Ct. at pp. 539-540 ["an officer can gain no

Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce"].) Under these circumstances, Deputy Lozano's mistakes of law, even if well meaning, and the People's subsequent attempts to rehabilitate them, are not objectively reasonable. (See *Heien*, *supra*, ___ U.S. at p. ___ [135 S.Ct. at p. 541 ["the test is satisfied when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view"] (conc. opn. of Kagan, J.).)

2. Other "Illegal Behavior"

The People argue that, even if the loitering statutes do not apply, Deputy Lozano had reasonable suspicion to believe Ellis could be involved in other illegal activity. They point to the facts that Deputy Lozano found Ellis in an area "known for narcotics activity" and knew Ellis "frequented the areas around the [bar] (where there were numerous recent complaints of individuals loitering) and [a motel], where methamphetamine was purchased and consumed." While we may consider an area's reputation for criminal activity as a factor relevant to determining whether, under the totality of the circumstances, an officer had reasonable suspicion to detain a person, that fact alone is not sufficient. (See *Souza*, *supra*, 9 Cal.4th at p. 239; *Pitts*, *supra*, 117 Cal.App.4th at p. 887.)

The People do not identify anything about Ellis's behavior that distinguished him from everyone else in the high crime neighborhood where he apparently lived. (See *Pitts*, *supra*, 117 Cal.App.4th at p. 887 ["'appellant's activity was no different from the activity of other pedestrians in that neighborhood'"].) Courts in similar circumstances have found facts like those advanced by the People here insufficient to constitute reasonable suspicion of

criminal activity. (See, e.g., *Casares*, *supra*, 62 Cal.4th at pp. 837-838 [awareness of prior robberies at a convenience store and that robbers had exited the parking lot on the north side of the building, without more, did not raise a reasonable suspicion that the defendant was engaged in criminal activity when he parked his van on that side of the building in a less well-lit part of the parking lot]; *Perrusquia*, *supra*, 150 Cal.App.4th at p. 233 ["[e]ven recent, specific crimes, without additional factors specific to the defendant, are not sufficient" to show reasonable suspicion]; see also *In re Tony C.* (1978) 21 Cal.3d 888, 897 [no reasonable suspicion to detain two teenagers walking in a high crime area during school hours]; cf. *Souza*, *supra*, 9 Cal.4th at pp. 239-240 [officers had reasonable suspicion where the defendant fled from police at 3:00 a.m. in a high crime area]; *People v. Limon* (1993) 17 Cal.App.4th 524, 532-534 [officers had reasonable suspicion where the defendant engaged in a hand-to-hand exchange for money on a street known for drug sales].) At the time Deputy Lozano detained Ellis, "he had no factual basis for a reasonable suspicion, as opposed to a mere hunch," that Ellis "was then engaged in any criminal activity, and a hunch is an inadequate basis for a detention." (*Casares*, at p. 838; see *People v. Wells* (2006) 38 Cal.4th 1078, 1083.)

D. *Deputy Lozano Did Not Have Advance Knowledge of Ellis's Status as a Parolee*

Suspicionless searches of parolees are lawful so long as they are not arbitrary, capricious, or harassing. (*Samson v. California* (2006) 547 U.S. 843, 856-857; *Douglas*, *supra*, 240 Cal.App.4th at p. 861; see *People v. Schmitz*, *supra*, 55 Cal.4th at p. 916 ["warrantless and suspicionless parole searches . . . are

reasonable, so long as the parolee's status is known to the officer and the search is not arbitrary, capricious, or harassing"]; *People v. Reyes* (1998) 19 Cal.4th 743, 753-754 ["'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer'"].) Suspicionless parole searches are justified by "'the state's compelling interest to supervise parolees and to ensure compliance with the terms of their release.'" (*Douglas*, at p. 861; accord, *Schmitz*, at p. 921.)

"Because a search condition is statutorily mandated for all parolees [citations], the officer need only know that the individual is on parole." (*Douglas*, *supra*, 240 Cal.App.4th at p. 862.) The officer, however, must know the individual was on parole *before* conducting the search. (*Ibid.*; see *Samson*, *supra*, 547 U.S. at p. 856, fn. 5; *People v. Sanders* (2003) 31 Cal.4th 318, 333; *People v. Middleton* (2005) 131 Cal.App.4th 732, 738.) "Without such advance knowledge, a search cannot rightly be justified as a [parole search], for the officer does not act pursuant to the search condition." (*Douglas*, at p. 862; see *Sanders*, at p. 333; *Middleton*, at p. 738.) Permitting the police to use a parole search condition to justify a search when an officer is unaware of a person's parole status would encourage unlawful police conduct, especially in neighborhoods where a higher than average number of persons are on probation or parole. (See *Sanders*, at p. 336; *People v. Robles* (2000) 23 Cal.4th 789, 800.)

A search founded on neither reasonable suspicion of criminal activity nor advance knowledge of parole status is arbitrary. (*Sanders*, *supra*, 31 Cal.4th at p. 333; *Douglas*, *supra*, 240 Cal.App.4th at p. 862.) An officer's belief in the subject's

status as a parolee must have been objectively reasonable in the totality of the circumstances. (*Douglas*, at p. 865; see *Sanders*, at p. 332 ["whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted"].)

The trial court found that Ellis admitted his parole status "simultaneously" with Deputy Lozano's request that Ellis approach the car, thus detaining him.[3] Even if this finding were supported by substantial evidence, it cannot support the conclusion that Deputy Lozano had "advance knowledge" of Ellis's parole status before detaining him. Simultaneous knowledge is not advance knowledge. Moreover, Deputy Lozano's equivocal testimony that he "wasn't too sure" whether Ellis had been on parole or probation five or six months earlier and did not know at the time of the August 2015 encounter whether Ellis was on parole does not constitute an objectively reasonable belief that Ellis was on parole in August 2015. (Cf. *Douglas*, *supra*, 240 Cal.App.4th at p. 858 [officer had an objectively reasonable belief the defendant was on probation where he testified that part of his job was to regularly monitor persons on probation and parole, he routinely used a database that listed probationers and parolees, and he had seen the defendant's name on a list of active probationers].) Because Deputy Lozano detained Ellis without reasonable suspicion of criminal activity or advance knowledge of his parole status, his detention of Ellis was arbitrary, and the

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[3] The trial court stated: "The officer stopped in a public area on privately owned property and asked [Ellis] to approach. Simultaneously with that, there was a sound [and] his statement verifying his parole status."

trial court erred in denying Ellis's motion to suppress evidence of the knife.[4]

DISPOSITION

The judgment is reversed and the case remanded with directions for the trial court to vacate its order denying Ellis's motion to suppress and to enter a new order granting the motion. Pursuant to section 1382, subdivision (a)(2), the People will have 60 days from the date of the filing of the remittitur in the trial court to file an election to retry Ellis.

SEGAL, J.

We concur:

ZELON, Acting P. J. SMALL, J.*

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[4] The People do not argue that Ellis's admission of his parole status subsequent to his unlawful detention attenuated the taint of that detention. (See, e.g., *People v. Durant* (2012) 205 Cal.App.4th 57, 65 ["[e]xclusion is *not* required where the connection to the original illegality has become so attenuated or has been interrupted by some intervening circumstance so as to remove the taint"]; accord, *Brendlin, supra*, 45 Cal.4th at p. 268.).

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.